1992

The State of Utah v. FranciscoTinoco : Brief of Appellee

Utah Court of Appeals

Jan Graham; Attorney General; Kris Leonard; Assistant Attorney General; Attorneys for Appellee.
Ronald S. Fujino; Lisa J. Remal; Salt Lake Legal Defender Association; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920665-CA
v.	:	
FRANCISCO TINOCO,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1990), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, PRESIDING.

JAN GRAHAM (1231)
Attorney General
KRIS LEONARD (4902)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

RONALD S. FUJINO
LISA J. REMAL
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

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RONALD S. FUJINO
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SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction by a jury of aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-3-103 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court correctly refuse to give defendant's proposed jury instructions regarding the elements of assault and aggravated assault? An allegation of error relating to the trial court's refusal to give proposed jury instructions presents a question of law which is reviewed on appeal for correctness with no particular deference given to the trial court's ruling. State v. Mincy, 838 P.2d 648, 658 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992); State v. Pedersen, 802 P.2d 1328, 1330 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991). Reversal is warranted only upon proof by defendant of prejudice stemming from the instructions viewed in the aggregate.

State v. Haston, 811 P.2d 929, 930-31 (Utah App. 1991), rev'd. on other grounds, 846 P.2d 1276 (Utah 1993); see also State v. McCumber, 622 P.2d 353, 359 (Utah 1980), abrogated on other grounds, State v. Ramirez, 817 P.2d 774 (Utah 1991).

2. Did the jury instructions improperly permit the jury to convict defendant of attempting a reckless act? This Court need not address the merits of this issue as defendant has not preserved the issue for appellate review. Utah R. Crim. P. 19(c); State v. Perdue, 813 P.2d 1201, 1203 (Utah App. 1991); State v. Becker, 803 P.2d 1290, 1293 (Utah App. 1990). When reviewing an allegation of instructional error for manifest injustice where no objection was raised below, as provided in rule 19(c) of the Utah Rules of Criminal Procedure, an appellate court uses the same two-prong test used to identify the existence of plain error under rule 103(d), Utah Rules of Evidence. State v. Verde, 770 P.2d 116, 121-22 (Utah 1989). First, the court must determine from the record "'that it should have been obvious to a trial court that it was committing error.'" Id. at 122 (quoting State v. Eldredge, 773 P.2d 29, 35 (Utah 1987), cert. denied, 493 U.S. 814 (1989)); see also State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991). Second, the error must be harmful in that it affects the substantial rights of the accused. Archambeau, 820 P.2d at 922; Verde, 770 P.2d at 122.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-5-102 (Supp. 1992):

> (1) Assault is:
>
> (a) an attempt, with unlawful force or violence, to do bodily injury to another;
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
> (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.
>
> (2) Assault is a class B misdemeanor.

Utah Code Ann. § 76-5-103 (1990):

> (1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:
> (a) intentionally causes serious bodily injury to another; or
> (b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.
>
> (2) Aggravated assault is a third degree felony.

The text of any other relevant constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained either in the body or in the appendix of this brief.

STATEMENT OF THE CASE

Defendant Francisco Tinoco was charged by information with attempted criminal homicide, murder, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (1990) (R. 7-8). The jury was instructed on attempted criminal homicide as well as the lesser included offense of aggravated assault (R. 109-18), and, following a two-day trial, convicted defendant of the lesser offense (R. 75, 132). The court ordered preparation of a

presentence report (R. 77), and thereafter sentenced defendant to serve no more than five years in the Utah State Prison, together with a consecutive term not to exceed five years for use of a firearm, and to pay restitution for the medical bills incurred by the victim (R. 136-37).

Defendant challenges his conviction and sentence, seeking a new trial.

STATEMENT OF FACTS

During April 1992, defendant, his wife, and their four children lived in one side of a duplex in Salt Lake City, Utah (R. 298, 383, 470, 496). Jesus Rodriguez was temporarily staying with friends in the other side of the duplex (R. 298, 326, 397, 438-39, 496). Several individuals, including defendant, testified at trial that shortly after midnight on April 21, 1992, defendant, his wife, Jesus, and a fourth person, Rogellio Quinones, were visiting and drinking beer in defendant's living room when defendant shot Jesus with a shotgun (R. 298, 304-13, 331-33, 345, 353, 361, 364, 481-82, 504). The testimony varied with respect to the factual details surrounding the shooting and the motive behind it; however, the fact that defendant shot Jesus was undisputed.

Defendant testified that Jesus got angry at him, called defendant names, and then lunged toward defendant to grab the shotgun he had been holding in his lap throughout Jesus' visit (R. 507-10, 512-15, 535-36, 547). Based on these facts and a

disputed encounter with Jesus earlier in the day, defendant claimed he shot Jesus in self-defense (R. 512-15).

Jesus testified that he thought defendant and Rogellio were angry and were going to fight with each other because of the way they were talking and acting (R. 311-12, 357-58). So Jesus stood up, started to walk to the living room door to go home, glanced back over his shoulder, and saw defendant shoot him (R. 311-12, 337, 347-48). The evidence indicated that all three men may have imbibed several beers over the course of the day (R. 322, 370, 372, 376-77, 417-18, 472-73, 478, 499-500), although Jesus testified that the only beer he drank was half of the can he was given while at defendant's apartment (R. 310, 321-22).

The blast entered Jesus' left arm one third of the way down, traveling from his left side and slightly behind him to exit at a higher point toward his armpit and enter the chest area on his left side without penetrating the chest cavity (R. 276-79, 288-90). The shot took one inch of bone from the arm and severed the main and ancillary arteries and veins in the arm (R. 282-83). The arm had no pulse when Jesus was admitted to the hospital emergency room (R. 279-80, 285-86). Following a lengthy and extensive initial surgery and two subsequent surgeries, Jesus was left with "some sensation of the upper extremity[,]" little motion at the shoulder, and no function below the shoulder (R. 285).

SUMMARY OF THE ARGUMENT

Defendant's entire appeal is based on the premise that the completed offense of assault, accomplished by means of "an attempt, with unlawful force or violence, to do bodily injury to another" as defined in Utah Code Ann. § 76-5-102(1)(a) (Supp. 1992), requires an intentional mental state. This Court need not address the issue of the requisite mental state because even if the trial court's refusal to give defendant's proposed instructions on the issue constitutes error, the error was harmless because, under the facts of this case, it is not likely that the result would have been different had the proposed instructions been given. The evidence in this case provides no factual basis on which the jury could have based its finding of assault on the attempt section of the assault statute. Moreover, there is no factual basis on which the jury could base the assault on a reckless mental state. Accordingly, any error in the court's instruction regarding the mental state required for an assault based on the attempt section of the assault statute would be harmless.

This Court need not reach the merits of defendant's claim that the jury instructions permitted the jury to convict him of attempting a reckless act in violation of Utah law because defendant failed to preserve the issue for appeal. The manifest injustice which may arise upon conviction of a non-existent crime is absent here where, under the specific facts in this case, any error in the jury instructions relating to the requisite mental

state for commission of assault by an attempt to inflict bodily injury did not affect the substantial rights of defendant because his conviction could not be premised either on the attempt section of the assault statute or on a reckless mental state. Consequently, defendant was not convicted of a non-existent crime.

ARGUMENT

POINT I

EVEN IF THE TRIAL COURT'S REFUSAL TO GIVE DEFENDANT'S PROPOSED INSTRUCTIONS CONSTITUTED ERROR, THE ERROR WAS HARMLESS WHERE, UNDER THE FACTS OF THIS CASE, DEFENDANT SUFFERED NO PREJUDICE

A. Introduction

Defendant contends that the trial court committed reversible error when it refused to give two of his proposed jury instructions concerning the elements of assault and aggravated assault. He argues that the elements instructions given to the jury contained improper and inconsistent mental states which permitted the jury to convict him of aggravated assault based solely on a reckless mental state when the underlying offense of assault, when accomplished by an attempt to do bodily injury, required a finding that he possessed an intentional mental state (Br. of App. at 5-8).

An allegation of error relating to the trial court's refusal to give proposed jury instructions presents a question of law which is reviewed on appeal for correctness with no deference given to the trial court's ruling. State v. Mincy, 838 P.2d 648,

658 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992); State v. Pedersen, 802 P.2d 1328, 1330 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991). Reversal is warranted only upon proof by defendant of prejudice stemming from the instructions viewed in the aggregate. State v. Haston, 811 P.2d 929, 930-31 (Utah App. 1991), rev'd on other grounds, 846 P.2d 1276 (Utah 1993); see also State v. McCumber, 622 P.2d 353, 359 (Utah 1980), abrogated on other grounds, State v. Ramirez, 817 P.2d 774 (Utah 1991).

B. Challenged Instructions

The jury was instructed on the charged offense of attempted criminal homicide as well as the lesser included offense of aggravated assault, the latter of which is at issue on appeal (R. 109-18). Because aggravated assault requires a preliminary finding of assault, the trial court gave the jury an instruction relating to assault which reflected the statutory language:

> "Assault" is:
>
> (a) an attempt, with unlawful force or violence, to do bodily injury to another; or
>
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
>
> (c) an act, committed with unlawful force or violence, that causes bodily injury to another.

(R. 116, Instruction 24; a copy of the instruction is attached in Addendum A). See Utah Code Ann. § 76-5-102(1) (Supp. 1992). Defendant verbally proposed that subsection (a) of the instruction be revised to provide that the statute's use of the term "attempt" required that it be an attempt "to intentionally

do" bodily injury to another (R. 567; a copy of the verbal argument is attached in Addendum A) (emphasis added).[1]

The court also gave an instruction outlining the elements required for aggravated assault, instructing that the jury find each of the following:

> 1. That on or about the 21st day of April of 1992 in Salt Lake County, State of Utah, the defendant Francisco Tinoco assaulted Jesus Rodriguez; and
>
> 2. That he did so by the use of a dangerous weapon or other means or force likely to produce death or serious bodily injury;
>
> 3. That the said defendant did so recklessly, intentionally or knowingly; and
>
> 4. That the defendant did so unlawfully and without legal justification.

(R. 115, Instruction 23; a copy of the instruction is attached in Addendum A). Use of the language in paragraphs 2 and 3 of this instruction has been upheld. See State v. Speer, 750 P.2d 186, 191 (Utah 1988); State v. Bradley, 752 P.2d 874, 878 (Utah 1985). Defendant proposed that paragraph three of the instruction be modified to read

> 3. That the said defendant did so recklessly, intentionally or knowingly, whichever is applicable.

(R. 567; Addendum A) (emphasis added). He argued that the additional language in both instructions was required to clarify for the jury the need for an intentional mental state before they

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[1] The initial discussion of the jury instructions occurred off the record. Defense counsel was later permitted to make a record of her objections, but neither the prosecutor's argument nor the details of the court's ruling were put on the record (R. 566-68).

could convict him of aggravated assault based on an attempt to do bodily harm (R. 567-68; Addendum A).

C. Argument

Defendant's appeal rests on his assertion that because § 76-5-102(1) specifically designates an attempt as one of three methods for committing the crime of assault, the attempt must be accompanied by an intentional mental state (Br. of App. at 6-7, 12). He first argues that because the jury may have premised the underlying assault on the "attempt" section of the statute, the court's failure to instruct the jurors on the need for an intentional mental state constitutes error (Id. at 6-7). He then argues that because his conviction for aggravated assault may have been based on a reckless mental state, and the jury was not specifically instructed that assault committed by an attempt to inflict bodily injury requires an intentional mental state, the jury was allowed to convict him of the legal impossibility of attempting a reckless act (Id. at 11-12). Both arguments rely on the cases of State v. Vigil, 842 P.2d 843 (Utah 1992), and State v. Howell, 649 P.2d 91 (Utah 1982), and the cases cited therein, involving Utah's attempt statute, Utah Code Ann. § 76-4-101 (1990) (a copy is attached in Addendum B).

The jury was properly instructed that in order to convict defendant of aggravated assault, it must first determine that he committed an assault, then find as an aggravating circumstance that he used "a dangerous weapon . . . or other means or force likely to produce death or serious bodily injury"

as provided in the aggravated assault statute (R. 115, Instruction No. 23; Addendum A). Utah Code Ann. § 76-5-103(1)(b) (1990). By statute, the underlying assault may be committed by

> (a) an attempt, with unlawful force or violence, to do bodily injury to another;
>
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
>
> (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

Utah Code Ann. § 76-5-102(1) (Supp. 1992).

This jurisdiction has not explored the implications, if any, of the Utah Supreme Court's interpretation of the mental state required for application of Utah's attempt statute, § 76-4-101, on offenses such as assault which, by statutory definition independent of § 76-4-101, may be completed by means of an attempt. Although by statute § 76-4-101 would seem inapplicable to the offense of assault, see Utah Code Ann. § 76-2-102 and § 76-4-301 (1990), an argument may be made that the Supreme Court's construction of the attempt statute may be applicable to the "attempt" component of the first variation of assault.[2] See,

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[2] Utah Code Ann. § 76-2-102 provides:

> [W]hen the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.

Utah Code Ann. § 76-4-301 provides:

> Whenever any offense specifically designates or defines an attempt or conspiracy and provides a penalty for the attempt or conspiracy other than provided in this chapter, the specific offense shall prevail

e.g., State v. Velarde, 734 P.2d 449, 454 (Utah 1986) (implying, but not deciding, that § 76-4-101 may impact on such statutorily-defined offenses despite § 76-2-102). However, the issue need not be reached in this case because even if the court's refusal to give defendant's proposed jury instructions constitutes error, the error was harmless in this instance where, under the facts of this case, it is not likely that the result would have been different had the proposed instructions been given. See State v. Bruce, 779 P.2d 646, 653 (Utah 1989).

Although the jury instructions as given in this case provided the jury with the option of finding that defendant committed an assault by any of the three means outlined in subsections (1)(a)-(c) of the statute, defendant's proposed modifications of the court's instructions, and his entire brief on appeal, relate solely to subsection (1)(a) of the assault statute. However, the jury could only have premised the assault on "an act" as provided in subsection (1)(c) in light of the evidence before it. The fact that defendant shot Jesus with a shotgun at close range was uncontested below; defendant, the victim, and two eyewitnesses testified to the fact (R. 301, 312-13, 337, 345, 365-66, 441, 489, 513, 547). Defendant admitted at trial the elements of assault under subsection (1)(c); that he shot the victim with a shotgun (R. 513, 515, 547), thereby committing "an act, . . . with unlawful force or violence, that cause[d] or create[d] a substantial risk of bodily injury to

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over the provisions of this section [chapter].

another." Utah Code Ann. § 76-5-102(1)(c) (Supp. 1992) (emphasis added).[3] He sought only to excuse his act on the basis of self-defense (R. 512-15). Where the record clearly provides no basis on which the assault could be premised on "an attempt . . . to do bodily injury to another" under § 76-5-102(1)(a), the trial court's failure to more fully instruct the jury concerning this inapplicable section of the statute would be, at most, harmless error. Cf. State v. Jones, 734 P.2d 473, 476 (Utah 1987) (even if inclusion of additional language in an instruction "would have more accurately stated the elements[,]" the language was not applicable to the facts of the case and its omission was, at most, harmless error); also Velarde, 734 P.2d at 453 (defendant was not entitled to have the jury instructed on simple assault where he admitted at trial the elements of assault and aggravated assault). Given the facts and the evidence, the jury was properly instructed on the applicable elements of assault, and any error in the court's refusal to give the proposed instructions concerning an inapplicable element would be harmless. See Haston, 811 P.2d at 930-31.

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[3] Defendant also freely admitted using the loaded shotgun to inflict the bodily injury, thereby admitting the requisite aggravating circumstance presented to the jury to establish the offense of aggravated assault; "[use of] a dangerous weapon . . . or other means or force likely to produce death or serious bodily injury." Utah Code Ann. § 76-5-103(1)(b) (1990); see Speer, 750 P.2d at 191 (defendant's uncontroverted testimony that he choked the victim until she almost passed out established aggravated assault under subsection (1)(b)); Velarde, 734 P.2d at 453, 454 (defendant admitted that he committed aggravated assault when, in addition to admitting conduct constituting an assault, he testified that he used a club on the victim).

Moreover, there is no factual basis in this case on which the jury could find that the assault was committed with a reckless mental state, thereby rendering harmless any error in the trial court's refusal to instruct the jury that more than reckless conduct was required. While one may not be guilty of an attempt to commit a crime if the completed crime requires a reckless mental state, Vigil, 842 P.2d at 847-48; Howell, 649 P.2d at 94 n.1; State v. Norman, 580 P.2d 237, 239 (Utah 1978), an attempt may occur where the completed crime requires intentional or knowing conduct. Vigil, 842 P.2d at 846, 848 n.5 (holding that the knowing mental state required for depraved indifference homicide does not satisfy the mental state required for an attempt, but providing that the requisite mental state is provided by the "knowing formulation" for murder and aggravated murder under §§ 76-5-202(1) and 76-5-203(1)(a)); Howell, 649 P.2d at 94 n.1; Norman, 580 P.2d at 239-40.

In addition to the testimony from defendant, Jesus, and the two eyewitnesses establishing that defendant shot Jesus, supra, defendant freely admitted that he shot Jesus in the arm because he did not want to shoot him in the body (R. 515). Defendant testified that he and Jesus were unacquainted before the day of the shooting (R. 496-97). Defendant met Jesus, Rogellio and another man outside his duplex in the early afternoon of April 21 (R. 294-95, 322-23, 368-69, 471-73, 497-98). He testified that because Jesus, for no known reason, said some "very ugly words" about him, made hand signals to one of the

other men and showed him two bullets, defendant went inside his apartment and moved his shotgun from his bedroom to the living room (R. 498-502, 521, 528). Later that day, defendant had Rogellio over and, after spending a number of hours together at defendant's apartment, Rogellio retrieved Jesus from the other side of the duplex and brought him to defendant's apartment (R. 297, 299, 328, 359-60, 502). As Jesus entered, defendant picked up the shotgun from under the sofa or against the wall (R. 507). Despite his earlier fear of Jesus, the fact that he had never spoken to Jesus before that day, and the fact that he believed Jesus to be drunk, defendant did not object to the visitor but gave him a beer and entertained him in his living room for half an hour (R. 304-05, 334, 361, 477, 480, 490, 501-02, 511, 521). Although there were no other guns in the room (R. 317, 385-87, 418, 493), defendant kept his loaded shotgun on his lap throughout the discussion, once moving it temporarily to his side when Jesus said he wanted to grab it, and unloading it and reloading at least once (R. 306, 308, 355-56, 507-09, 523-25, 529).

Defendant testified that at some point, without provocation, Jesus began calling him names and "getting upset" with him (R. 509-12). When Jesus stood up, defendant testified that Jesus said, "[I]t's time. I had enough[,]" and that he "looked like he was going to jump on [defendant]" (R. 512-13, 521-22, 539-40). At that point defendant raised the loaded shotgun from his lap, held the barrel approximately six inches

from Jesus' left arm and pulled the trigger (R. 514-15, 523, 539). Defendant did not try to help Jesus after shooting him and did not call for emergency help (R. 530). Instead, he took the shell out of the gun, propped it against the living room wall, and went upstairs to his bedroom where he was later found by the investigating officers (R. 384-85, 391-92, 525-26).

This evidence, based on defendant's own testimony, together with the jury's obvious rejection of defendant's self-defense theory, reflects that defendant acted with more than a reckless mental state, i.e., an intentional or knowing mental state. Hence, the finding of an assault, even if premised on the attempt section of the statute, was supported by an appropriate mental state, and it is unlikely that the result would have been different had defendant's proposed instructions been given. Accordingly, any error in the court's refusal to give the proposed instructions would be harmless. See Haston, 811 P.2d at 930-31.

POINT II

DEFENDANT FAILED TO PRESERVE HIS CONTENTION THAT HE WAS CONVICTED OF A LEGALLY IMPOSSIBLE OFFENSE, AND THE RECORD DOES NOT ESTABLISH THE HARM NECESSARY TO REVERSE HIS CONVICTION BASED ON MANIFEST INJUSTICE

Defendant argues that because aggravated assault may be committed with a reckless mental state, and the jury was not specifically instructed that assault committed by an attempt to inflict bodily injury requires a different mental state (see

Point I, supra), the jury was allowed to convict him of the legal impossibility of attempting a reckless act (Br. of App. at 11).

This Court need not address the merits of this issue as defendant has not preserved the issue for appellate review. Utah R. Crim. P. 19(c) (requiring that the grounds of any objection to jury instructions be stated with specificity); State v. Singh, 819 P.2d 356, 360 n.2 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992); State v. Perdue, 813 P.2d 1201, 1203 (Utah App. 1991); State v. Becker, 803 P.2d 1290, 1293 (Utah App. 1990). Defendant recognizes that there was no objection to the instructions below on the basis that they allowed conviction for a non-existent offense (Br. of App. at 12-13 & n.4). He urges this Court to reach the merits of this claim because of the manifest injustice inherent in a conviction for a "crime" which does not exist (Id. at 12-13).

When reviewing an allegation of instructional error for manifest injustice as provided in rule 19(c), Utah Rules of Criminal Procedure, an appellate court uses the same two-prong test used to identify the existence of plain error under rule 103(d), Utah Rules of Evidence. State v. Verde, 770 P.2d 116, 121-22 (Utah 1989). First, the court must determine from the record "'that it should have been obvious to a trial court that it was committing error.'" Id. at 122 (quoting State v. Eldredge, 773 P.2d 29, 35 (Utah 1987), cert. denied,493 U.S. 814 (1989)); see also State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991). Second, the error must be harmful in that it affects

the substantial rights of the accused. Archambeau, 820 P.2d at 922; Verde, 770 P.2d at 122; see also State v. Archuleta, 209 Utah Adv. Rep. 12, 18 (Utah Mar. 25, 1993).

Assuming, arguendo, that the attempt section of the assault statute requires more than reckless conduct (see Point I, supra), and that the court's refusal to instruct the jury accordingly constituted obvious error under the first prong of the plain error test, reversal would not be warranted because the record does not reflect that the error affected defendant's substantial rights as required by the second prong of the test. In light of defendant's admission that he performed a completed act causing bodily injury, the jury had no evidentiary basis on which to premise the assault on the attempt section of the assault statute. See Point I, supra. Neither is there any factual basis in this record for a finding of recklessness in the commission of the assault. Id. It is clear that the court's instruction, relating to the mental state required for an attempt under the assault statute, even assuming it was erroneous, could not have affected the jury's verdict in this case. Because defendant could not have been convicted of attempting a reckless act, his substantial rights were not affected by the error and his argument must fail. Cf. Archuleta, 209 Utah Adv. Rep. at 18-19 (finding harmless an obvious error in the trial court's inclusion of an improper aggravating circumstance because it did not affect defendant's substantial rights in either the guilt or

the penalty phase of his trial where the circumstance was not necessary to his conviction or sentence).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 21ST day of April, 1993.

JAN GRAHAM
Attorney General

KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Ronald S. Fujino and Lisa J. Remal, attorneys for appellant, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 21ST day of April, 1993.

ADDENDA

ADDENDUM A

INSTRUCTION NO. 23

Before you can convict the defendant, Francisco Tinoco, of the offense of Aggravated Assault, a lesser included offense of Count I of the Information, you must have found that the evidence fails to establish one or more of the elements of Attempted Criminal Homicide, Murder beyond a reasonable doubt, and you must find from the evidence, beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That on or about the 21st day of April of 1992 in Salt Lake County, State of Utah, the defendant Francisco Tinoco assaulted Jesus Rodriguez; and

2. That he did so by the use of a dangerous weapon or other means or force likely to produce death or serious bodily injury;

3. That the said defendant did so recklessly, intentionally or knowingly; and

4. That the defendant did so unlawfully and without legal justification.

If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find that the defendant guilty of the offense of Aggravated Assault, a lesser included offense of Count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count I.

INSTRUCTION NO. 24

"Assault" is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another; or

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another.

"Bodily injury" means physical pain, illness or an impairment of physical condition.

"Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

(a) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(b) the actor represents to the victim verbally or in any other manner that the actor is in control of such an item.

"Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

"Unlawful or unlawfully" means that which is contrary to law or unauthorized by law, or, without legal justification, or, illegal.

here trying to calculate. If we go right through from here without breaking for lunch, what time it will be before anyone gets lunch. I guess it will be about two o'clock.

THE COURT: It would be two o'clock before you eat. Go in and talk about it for a minute, folks. All right. Counsel, I'm going to need to see you in chambers, regardless of what the jury decides to do. All right. We'll be in recess.

(a recess was taken)

THE COURT: We continue in State of Utah versus Francisco Tinoco. The record will reflect that counsel are present, defendant's present, the jury has not yet return to the courtroom, and I've asked them to remain in the jury room so that you can take your formal exceptions, counsel. The record should reflect that we've discussed the instructions that will be given, as well as discussed each one of the requested instructions, and I heard from counsel with regard to any difficulties, or legal positions that may be -- may have been offered, but I think it's appropriate that you have an opportunity to take your formal exceptions prior to the jury being instructed. State have any formal exceptions for the record?

MS. BYRNE: I don't believe so, Your Honor.

I was just looking for the elements instruction on criminal homicide, but I do not have any exceptions to the way the Court has decided to include or not include the instructions.

THE COURT: Ms. Remal?

MS. REMAL: Your Honor, I have two exceptions to make to the instructions, those are two instructions, numbers twenty-three and twenty-four. My exception is based on my belief that subsection A of the assault definition contained in instruction number twenty-four should by law contain an indication that that requires intentional conduct. And the suggestion I made to the Court in order to accomplish that was to insert the word intentionally between to and do, so that it would read an attempt with unlawful force or violence to intentionally do bodily injury to another.

In concert with that, it was my suggestion that element number three of the elements of aggravated assault, instruction number twenty-three, have the phrase added to it, whichever is applicable, so that element number three would read that the said defendant did so recklessly, intentionally, or knowingly, whichever is applicable. My reasoning for that is that as we previously discussed, the case law which talks about what kind of intent is required for any attempted offense is

that it's required that it be a specific intent type of offense. And so because the subsection A definition of assault is an attempt, it's my belief that that requires a specific intent of intentionally doing bodily injury to another. And for those reasons I take exceptions to those two instructions.

THE COURT: Very good. Exceptions are noted. Anything else before I bring the jury back in, counsel and instruct them in the fashion that I've suggested?

MS. BYRNE: No.

MS. REMAL: No.

THE COURT: Bring them in.

(Jury returned to the courtroom.)

THE COURT: Counsel, please be seated. The record will show the jury has returned to the courtroom. Ladies and gentlemen, the instructions that I spoke of earlier have now been completed. Counsel and I have reviewed the law and the facts that apply to this case, and have prepared instructions that I hope will encompass all the information that you will need to reach a just, a fair, and a lawful verdict in this case. I'm required by law before closing argument to read the instructions to the jury. The jury is orally charged. And you will have -- however, you will have the written instructions to take with you into the jury room should you choose to

ADDENDUM B

CHAPTER 4
INCHOATE OFFENSES

PART 1
ATTEMPT

76-4-101. Attempt — Elements of offense.

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) Because the offense attempted was actually committed; or

(b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

History: C. 1953, 76-4-101, enacted by L. 1973, ch. 196, § 76-4-101.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Preclusion of the defense of impossibility by this section does not violate the due process clause of the Fourteenth Amendment. State v. Sommers, 569 P.2d 1110 (Utah 1977).

Attempted murder.

The crime of attempted murder requires proof of intent to kill. Attempted murder does not fit within the felony-murder doctrine because an attempt to commit a crime requires proof of an intent to consummate the crime. Therefore, it follows that attempted felony-murder does not exist as a crime in Utah. State v. Bell, 122 Utah Adv. Rep. 7 (1989).

Attempt to receive stolen property.

Where defendant purchased property with